Bitutech Sdn Bhd & Ors v Bosco Philip Anthony & 2 Ors (No 2)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2 (S6)-23-92-1999(2)
KAMALANATHAN RATNAM J
30 MARCH 2001

Civil Procedure *— Pleadings — Striking out claim — Appeal against decision of judge allowing second defendant's appeal from the decision of the senior assistant registrar dismissing the second defendant's application to strike out the plaintiff's claim — Rules of the High Court O 18 r 19*

The plaintiffs appealed against a judgment given on 2 January 2001, wherein the judge allowed the second defendant's appeal from the decision of the senior assistant registrar dismissing the second defendant's application in respect of encl 10. Enclosure 10 was the second defendant's application to strike out the plaintiffs' claim.

Held, allowing the appeal with costs:

(1) It is the judgment of the court that whilst the said two letters were indeed copied to the chairman who is the second defendant in this case, the court cannot reject its earlier finding that the first defendant had acted on his own volition when he sent the e-mail to the two recipients of the same. In fact, such finding of fact that was made was also on the admission of the first defendant and the concession by the plaintiffs' solicitors that such was indeed a fact. It is indeed surprising that the plaintiffs made no objections to such admission by the first defendant, nor did the plaintiffs ask that such admission be made an issue to be tried (see p 627H–I).

(2) To the mind of the court, there was therefore no longer a case open to the plaintiffs against the second defendant. The court therefore saw no need even for the appellant to argue his case (see p 628A).

[**Bahasa Malaysia summary**

Plaintif-plaintif telah membuat rayuan terhadap satu penghakiman yang telah diberikan pada 2 Januari 2001, di mana hakim tersebut telah membenarkan rayuan defendan kedua daripada keputusan penolong kanan pendaftar yang menolak permohonan defendan kedua berkaitan lampiran 10. Lampiran 10 adalah permohonan defendan kedua untuk membatlkan tuntutan plaintif-plaintif.

Diputuskan, membenarkan rauan tersebut dengan kos:

(1) Adalah penghakiman mahkamah bahawa meskipun kedua-dua pucuk surat tersebut sememangnya telah dibuat salinan kepada pengerusi yang merupakan defendan kedua di dalam kes ini,

mahkamah tidak boleh menolak penemuannya yang terdahulu bahawa defendan pertama telah bertindak dengan kerelaannya sendiri apabila beliau menghantar e-mail tersebut kepada dua penerima yang sama. Pada hakikatnya, penemuan fakta sedemikian yang telah dibuat juga merupakan pengakuan defendan pertama dan konsesi oleh peguamcara plaintif-plaintif bahawa demikian adalah sememangnya satu fakta. Adalah memang mengejutkan bahawa plaintif-plaintif tidak membuat apa-apa bantahan terhadap pengakuan sedemikian oleh defendan pertama, maupun plaintif-plaintif telah menanyakan bahawa pengakuan demikian dijadikan satu isu yang perlu dibicarakan (lihat ms 627H–I).

(2) Pada hemat mahkamah, tiada lagi satu kes yang terbuka kepada plaitif-plaintif terhadap defendan kedua. Mahkamah oleh itu mendapati tidak perlu juga untuk perayu menghujahkan kes beliau (lihat ms 628A).]

Notes

For cases on striking out claim, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3620–3637.

Cases referred to

Bitutech Sdn Bhd & Ors v Bosco Philip Anthony & Ors [2001] 5 MLJ 277 (refd)

Legislation referred to

Rules of the High Court 1980, O 18 r 19(a), (b), (c) and (d).

Edwin Lim (*Edwin Lim & Co*) for the respondents/plaintiffs.

Rosli Dahlan (*S Vanitha* with him) (*Allen & Gledhill*) for the appellant/second defendant.

Kamalanathan Ratnam J. : This is an appeal by the plaintiffs against my decision given on 2 January 2001, wherein I allowed the second defendant's appeal from the decision of the learned senior assistant registrar ('the SAR') dismissing the second defendant's application on 24 November 2000 in respect of encl 10. Enclosure 10 was an application by the second defendant under O 18 r 19(a), (b), (c) and (d) of the Rules of the High Court 1980 ('the RHC') to strike out the plaintiffs' claim.

Facts

The facts relating to this case have been fully set out by me in my earlier written judgment given on 12 October 2000 (see *Bitutech Sdn Bhd & Ors v Bosco Philip Anthony & Ors* [2001] 5 MLJ 277). In that case, the third defendant had made a similar application to strike out the writ against him on various grounds and the relevant ground being, that the e-mailer of the

alleged defamatory message to the Yang di-Pertua Majlis Perbandaran Selayang, and to the Director, Department of Environment, State of Selangor, was not the third defendant nor was the e-mailer, the third defendant's servant or agent in respect of the act of e-mailing as the third defendant did not instruct the first defendant, who was his solicitor, to send the e-mail to either or both of the recipients. The learned SAR, in that case, allowed the third defendant's application and struck out the writ and statement of claim as against the third defendant. Being dissatisfied with that decision, the plaintiffs appealed. During the arguments before me, the plaintiffs' and the third defendant's solicitors agreed that when the first defendant representing himself, submitted before the learned SAR, he had confirmed that he did not act on behalf of the second and third defendants when he sent the offending e-mail to the two recipients referred to earlier. I had also made a finding of fact in that case that the said solicitor, namely, the first defendant, had himself a personal interest in the case as he was a resident of that area BRP5 which was alleged to have been polluted by the plaintiffs. I had said in that judgment as follows:

> The solicitor himself confirmed that he acted on his own volition in sending the e-mail and without the consent or authorization of the third defendant. This admission must be taken together with the fact that the solicitor himself is the first defendant and is also acting for himself with an interest in the matter in question. Once this evidence was before the court, I did not think it was necessary for me to hear from the respondent. I therefore dismissed the appeal with costs.

Against that decision of mine the plaintiffs appealed. However, on 2 January 2001, Mr Edwin Lim, the counsel for the plaintiffs in both these cases, informed me in open court that he had instructions to withdraw the notice of appeal against my decision given on 12 October 2000. Once this concession was made, I directed the respondent to submit as to why I ought not to allow this appeal based on my earlier findings against which there was now no longer any appeal and in which case, such findings that I had made ought to stand. Mr Edwin Lim then argued that the first defendant had in fact acted on instructions. He referred me to two exhibits which were in fact copies of two letters, exhs TA-6 dated 3 October 1999 and TA-8 dated 13 August 1999 from the first defendant's firm and addressed to the Yang di-Pertua and to the plaintiffs' solicitors respectively and the said two letters were copied to 'The Chairman, Tunku Alizan and Committee Members of BRP5'.

It is my judgment that whilst the said two letters were indeed copied to the chairman who is the second defendant in this case, I cannot reject my earlier finding that the first defendant had acted on his own volition when he sent the e-mail to the two recipients of the same. In fact, such finding of fact that I made was also on the admission of the first defendant and the concession by the plaintiffs' solicitors that such was indeed a fact. It is indeed surprising that the plaintiffs made no objections to such admission by the first defendant, nor did the plaintiffs ask that such admission be made an issue to be tried. What is even more surprising is that the plaintiffs were even prepared to withdraw their appeal against my earlier decision made on

12 October 2000, therefore making my finding of fact that the first defendant indeed acted without the second and third defendants' instructions, no longer an issue. To my mind, there was therefore no longer a case open to the plaintiffs against the second defendant. I therefore saw no need even for the appellant to argue his case. The appeal was thus allowed with costs.

Appeal allowed with costs.

Reported by Wong Ee Lynn